Supreme Court, U. S.
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MICHAEL RODAK, JR. C

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 79-439

RICHARD W. WHITE,
Petitioner,

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPERIOR COURT, APPELLATE BRANCH, COUNTY OF SAN DIEGO

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The Petitioner, RICHARD W. WHITE, respectfully prays that a writ of certiorari issue to review the judgment of the California Superior Court, Appellate Branch, County of San Diego entered in this proceeding on April 10, 1979, affirming the conviction of petitioner by the Municipal Court, El Cajon Judicial District, County of San Diego, State of California on December 2, 1977.

OPINIONS BELOW

The order of the Superior Court of California, County of San Diego, Appellate Department denying petitioner's petition for a certification to the

Court of Appeal, Fourth Appellate District, Division One appears in Appendix A to this petition.

The opinion of the Superior Court of California, County of San Diego, Appellate Department appears in Appendix B to this petition.

JURISDICTION

The order of the Superior Court of California, County of San Diego, Appellate Department denying petitioner's petition for certification to the Court of Appeal, Fourth Appellate District, Division One, was filed May 24, 1979. That request for certification was not timely filed in accordance with the California Rules of Court, Rule 107(b)(1). However this petition for certiorari was filed within ninety days of the judgment of the Appellate Department becoming final which was April 17, 1979, pursuant to Rule 107(b). In addition, an extension of time for filing the herein petition was granted on July 18, 1979, to and including September 17, 1979.

This Court's jurisdiction is invoked under 28 U.S. section 1257(3).

QUESTION PRESENTED

Is California Penal Code section 597f, to the extent that it commands the impoundment of any farm animal "neglected" by its owner, constitutionally invalid for failure to provide the owner or person entitled to possession of the animals a reasonable notice and hearing as required by the due process clause of the Fourteenth Amendment ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code section 597:

> [Cruelty to animals defined.]
> (a) Every person who maliciously maims, wounds, tortures, or mutilates a living animal which is the property of another, or maliciously kills an animal which is the property of another, is guilty of an offense punishable by imprisonment in the state prison, or in county jail for not more than one year.
> (b) Except as otherwise provided in subdivision (a), every person who overdrives, overloads drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, cruelly beats, mutilates, or cruelly kills

any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink or shelter, or to be cruelly killed; and whoever, having the charge or custody of any animal, either as owned or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the same, or in any manner abuses any animal, or fails to provide the same with proper food, drink, shelter or protection from the weather, or who drives, rides or otherwise uses the same when unfit for labor, is for every such offense, guilty of a misdemeanor. [1972; 1905 ch 517 §1; 1909 ch 661 §1; 1972 ch 779 §1; 1976 ch 1139 §251, operative July 1, 1977.]. Cal Jur 3d Abandoned, Los, and Escheated Property §8, Animals §§89, 90, Criminal Law §63; Witkin Crimes pp 439, 440.

California Penal Code section 597f:

[Permitting animal to go without care: Duties of peace or humane society officer to care for same: Killing of sick or disabled animal abandoned by owner: Seizure of unfit

or cruelly treated animal: Notice to owner: Care of Animal: Lien for expenses.] Every owner, driver, or possessor or any animal, who shall permit the same to be in any building, enclosure, lane, street, square, or lot, of any city, city and county, or judicial district, without proper care and attention, shall, on conviction, be deemed guilty of a misdemeanor. And it shall be the duty of any peace officer, officer of a pound or animal regulation department of a public agency, to take possession of the animal so abandoned or neglected and care for the same until it is redeemed by the owner or claimant, and the cost of caring for such animal shall be a lien on the same until the charges are paid. Every sick, disabled, infirm, or crippled animal, except a dog or cat, which shall be abandoned in any city, city and county, or judicial district, may, if after due search no owner can be found therefor, be killed by such officer; and it shall be the duty of all peace officers, an officer of such society, or officer of a pound or animal regulation department of a public agency to cause

the same to be killed on information of such abadonment. Such officer may likewise take charge of any animal, including a dog or cat, that by reason of lameness, sickness, feebleness, or neglect, is unfit for the labor it is performing, or that in any other manner is being cruelly treated; and, if such animal is not then in the custody of its owner, such officer shall give notice thereof to such owner, if known, and may provide suitable care for such animal until it is deemed to be in a suitable condition to be delivered to such owner, and any necessary expenses which may be incurred for taking care of and keeping the same shall be a lien thereon, to be paid before the same can be lawfully recovered.

It shall be the duty of all officers of pounds or humane societies, and animal regulation departments, to cause to be conveyed all injured cats and dogs found without their owners in a public place directly to a veterinarian known by such officer or agency to be a veterinarian that ordinarily treats dogs and cats for a determination of whether the animal shall be immediately and humanely destroyed or shall be

hospitalized under proper care and given emergency treatment. Any such veterinarian who agrees to make such a determination, shall himself perform euthanasia on an animal if the owner does not redeem the animal within the locally prescribed waiting period or if he determines that such animal has incurred severe injures or is incurably crippled. If any such veterinarian determines that the animal shall be hospitalized under proper care and given emergency treatment, the costs of any such services which are provided pending the owner's inquiry to such agency, department, or society shall be paid from the dog license fees, fines and fees for impounding dogs in the city, county, or city and county in which the animal was licensed or if the animal is unlicensed the jurisdiction in which the animal was found, subjecto to the provision that this cost be repaid by the animal's owner. No such veterinarian shall be criminally or civilly liable for any decision which he makes or services which he provides pursuant to the provisions of this section.

Notwithstanding any other provisions of this section, any officer of a pound or animal

regulation department or humane society, or any officer of a police or sheriff's department may, with the approval of his immediate superior, humanely destroy any abandoned animal in the field in any case where the animal is too severely injured to move or where a veterinarian is not available and it would be more humane to dispose of such animal. [1905 ch 519 §2; 1951 ch 1608 §7; 1963 ch 1583 §1; 1970 ch 580 §1.] 3 Cal Jur 3d Animals §§89, 91.

STATEMENT OF THE CASE

Petitioner WHITE was found guilty by a court trial of one count of violation of California Penal Code section 597(b) [Cruelty to Animals] [See Reporter's Transcript of hearing, which will be lodged with this court should a hearing be granted] (RT-216).

On Saturday morning October 16, 1976, Officer J.W. Cummins of the State Humane Society, in uniform but in an unmarked pick-up truck, drove to the front gate of Petitioner's residence in Santee, California. (RT-21) He was responding to an undisclosed complaint regarding a horse under flesh on WHITE's property. (RT-21)

He was informed by a high school student employed by WHITE to feed the horse that WHITE was out of town. (RT-22) He directed the student to

find Mrs. White and then entered the premises without invitation. No search warrant had either been sought or issued at that time or any time subsequent, nor had anyone consented to Cummins' entry. (Rt-23) Mrs. White appeared and told Cummins that WHITE was not available. After a brief conversation Cummins determined that Mrs. White had little connection with the horses and ordered her back to the residence. (RT-26)

Cummins then inspected the WHITE property and horses, and, prior to leaving, informed Mrs. White he had impounded a horse named Storm. (RT-27) Of the twenty horses then on the WHITE property eleven belonged to WHITE and nine were boarded. Two days later Mrs. White signed the horse over to the State Humane Society in the presence of Officer Cummins in order to stop the feeding and boarder charges. WHITE was still unavailable. (RT-37)

On November 3, 1976, eighteen days after the seizure WHITE was charged with violation of California Penal Code section 597(b).

The federal question sought to be reviewed in this petition was raised in the Superior Court of Calfornia, Appellate Branch, in WHITE's Opening Brief and in oral argument before the court.

Inapposite to the holding of the Appellate Branch of the Superior Court of San Diego County is the holding of the Court of Appeal, Fifth Appellate District, in Carrera v. Bertaini (1976) 63 Cal.App. 3d 721, holding California Penal Code

section 597f is constitutionally invalid for its failure to provide the owner or person entitled to possession of an animal reasonable notice and hearing, as required by the due process clause of the Fourteenth Amendment of the United States Constitution. In the interim there have been no additional published opinions in California nor have there been any legislative modifications to Penal Code section 597f.

WHITE's petition for certification in the Court of Appeal asked for reconsideration of that portion of the decision.

SUMMARY OF ARGUMENT OF QUESTION

California Penal Code section 597f, to the extent that it commands the impoundment of any farm animal, "neglected" by its owner is constitutionally invalid for its failure to provide the owner or person entitled to possession of the animal a reasonable notice and hearing as required by the due process clause of the Fourteenth Amendment.

ARGUMENT OF QUESTION

At the time of the seizure, no arrest was made nor were any criminal proceedgings pending.

It is not contended that no basis existed for a warrant or that some alternative basis for search without a warrant, such as plain view, consent, and so forth, did not exist. Rather it is specifically contended that the basis relied upon

by Cummins in seizing one of WHITE's horses is constitutionally infirm. This is particularly significant, because it was at least two weeks after the horse had been seized and signed over to the State Humane Society that any criminal matters arose.

The seizure of WHITE's horse was authorized according to Cummins, from authority set forth in California Penal Code section 597f which provides in part:

> Every owner, driver, or possessor of any animal, who shall permit the same to be in any building, enclosure, lane, street, or judicial district, without proper care and attention, shall, on conviction be deemed guilty of a misdemeanor. And it shall be the duty of any peace officer of the humane society or officer of a pound or any animal regulation department of a public agency, to take possession of the animal so abandoned and neglected and care for the same until it is redeemed by the owner or claimant and the cost of caring for such animal shall be a lien on the same until the charges are paid.

Mathews v. Eldridge, 424 U.S. 319, 335; 47 L.Ed.2d 18, 96 S.Ct. 893, lends the

following guidance:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Cites omitted)

WHITE's private interest in his personal property--his horse--is apparent.

The risk of erroneous deprivation here was central. WHITE contended at trial that the horse Storm was under medical treatment at the time of the seizure. He contended the horse had been poisoned as a result of drinking water from a pond located on his property that had been inadvertently sprayed with insecticide by the County.

Rather than seizure, prior to WHITE's return from his trip, since Cummins had been told of the treatment given the animal by the attendant on the property, a hearing would have afforded a neutral forum to weigh WHITE's contentions. Such

a hearing would have imposed a minimal burden on the County's administration, and may have resulted in saving administrative time and money by informally resolving the matter. The benefit of this type of safeguard, in addition to providing the assurance to the individual in society that the agency action is just, may also be the linchpin missing in Penal Code section 597f and thus rendering that section unconstitutional to at least one California Appellate Court.

Here, by the time of trial the cost to redeem the horse would have been prohibitive. It is apparent that Mrs. White was advised to sign the horse over to the County at the risk of continuing to incur boarding and feeding charges. The difficulty of Mrs. White's position was exacerbated in that there was no mention made by the County official as to any possible length of deprivation of the horse. As this court has recognized in Fusari v. Steinberg, 419 U.S. 374, 42 L.Ed.2d. 521, 95 S.Ct. 533, the length of the deprivation is an important factor in assessing the impact of official action on the private interests.

Finally, the interests of the government and the public at large is not served by such summary treatment as WHITE received. Unlike Carrera v. Bertaini, supra, there is no allegation here that the animal seized was found at large, on any of the adjacent streets or public places, or upon any other private property in WHITE's neighborhood. Similarly, there is no indication that the "extra-

ordinary situations" addressed in Fuentes v. Shevin, 407 U.S. 67, 42 L.Ed.2d 556, 92 S.Ct. 1983, exist here.

> Only in a few limited situations has this court allowed outright seizure without opportunity for prior hearing. First in each case, the seizure has been directly necessary to secure an important government or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated foods. Fuentes v. Shevin, 407 U.S. 90, 92, 32 L.Ed.2d 556, 92 S.Ct. 1983.

It was never contended that the horse

posed a danger to either the community at large, to the drivers of highways in the vicinity of petitioner's residence, or to other animals.

Penal Code section 597f and its related code sections are fatally lacking proper provision for an administrative hearing after seizure to determine if in fact it was justified. In Central Union Trust v. Garvan, 254 U.S. 554, 41 S.Ct. 214, where the Supreme Court held that summary seizure of enemy property during World War I was justified, the law provided that the property owner had the right to file a written claim with the agent of the president authorizing seizure, who determined the validity of the seizure. Where prehearing seizure of money by the Internal Revenue Service was upheld in Phillips v. Commisioners of Internal Revenue, 283 U.S. 589, 51 S. Ct. 608, the law provided for speedy appeal before the Board of Tax Appeals. Again in Fahey v. Mallonee, 332 U.S. 245 67 S.Ct. 1552, where a prehearing takeover the management of a federal bank was upheld, federal regulations had provided for notice and a hearing immediately after the takeover. See 24 C.F.R. Section 206.1(a)(10). In Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, the court allowed summary seizure of mislabled drugs, but, once seized, the U.S. Attorney was obligated to commence suite in order to prove that the seizure was justified.

Thus, in those statutes where the government could take property before a hearing, the statutes also provided for

quick reviews by the administrative agency or obligated the government to initiate a civil action to determine if the action itself was justified. The same statute that provided for seizure should provide for a post seizure hearing.

Lastly it cannot be contended that Cummins' statements at the time of the seizure were adequate notice so as to excuse the County from its obligation under due process. In People v. Broad, 216 Cal. 1, 12 P.2d 941, 944, the court made clear that voluntary acts by government officials do not satisfy due process requirements of notice and hearing and the statutes temselves must adequately provide notice.

> ...The essential validity of the law was to be tested not by what has been done under it, but what may by its authority be done; and where a statute authorizes a taking of private property, but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules concerning the situation.

In balance the extraordinary weight vested in the judgment of Officer Cummins is insufficient protection to WHITE. Due process implies that California Penal Code Section 597f and related code sec-

tions should also impose a hearing for the protection of the animal owner.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Appellate Branch of the Superior Court of the State of California in affirming the decision of the Municipal Court, El Cajon Judicial District and in denying certification to the California Court of Appeal, Fourth District, Division One.

September 12, 1979 Respectfully submitted,

MEANEY & PLAYER

By: W. Meaney
MICHAEL MEANEY
Attorney for WHITE

Robert D. Zumwalt, Clerk
MAY 24 1979
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED MAY 24 1979

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD W. WHITE, Defendant and Appellant.	SUPERIOR COURT NO. CR 44873 MUNICIPAL COURT NO. C 56652 (El Cajon Judicial District)

O R D E R

Application for certification to the Court of Appeal, Fourth Appellate District, Division One, is denied.

BY THE COURT

_____ P.J.

_____ J.

L/pap

APPENDIX A

FILE
Robert D. Zumwalt Clerk
APR 10 1979
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED APR 10 1979

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD W. WHITE, Defendant and Appellant.	SUPERIOR COURT NO. CR 44873 MUNICIPAL COURT NO. C 56652 (El Cajon Judicial District)

O R D E R

Judgment affirmed.

BY THE COURT

P

J

J

APPENDIX B